EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2014/26 French Supreme Court rejects E101 posting certificates (FR)

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the airlines' activities were entirely oriented towards national territory, and carried out on a regular, stable and continuous basis or through infrastructures located in national territory. The airlines could not therefore rely on the E101-certificates.

Facts

(Vueling)

Vueling is a low cost Spanish airline with its headquarters in Barcelona. In 2007 it opened a branch or office (the exact status was in dispute) at *Charles de Gaulle* Airport in Roissy, Paris. It registered this branch with the local Companies Register. It proceeded to hire over one hundred employees, mainly flight crew, maintenance personnel and commercial staff, but also a Country Manager and a Base Manager. The published documents do not specify the nationality of these employees, but it seems likely that at least some of them were French citizens residing in France.

Vueling applied to the relevant Spanish authority for E101-certificates in respect of its staff based in *Charles de Gaulle*. Under Regulation 1408/71 and the implementing provisions contained in Regulation 574/72, which were in force at the time, an E101-certificate was a document certifying that an individual who is employed in country A (in this case, Spain) and is temporarily posted to country B (in this case, France) continues to be covered by country A's social insurance legislation and is therefore not covered by that of country B. Article 14(1)(a) of Regulation 1408/71 is worded as follows:

"A person employed in the territory of a Member State by an undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of that work does not exceed 12 months and that he is not sent to replace another person who has completed his term of posting."

If a posting exceeded the anticipated duration owing to unforeseen circumstances, the period stated on the E101-certificate could be extended, and this would be confirmed in an E102 – certificate. Such a certificate would be issued by the relevant authority in country A, provided the relevant authority in country B gave its consent. *[Note that Regulation 1408/71 was replaced with effect from 1 May 2010 by Regulation 883/2004, although its contents are by and large similar. In the period covered by the case reported here, the old regulation was still in force.]*

Accordingly, Vueling paid (low) Spanish and not (higher) French social contributions and its

employees in *Charles de Gaulle* were covered by the Spanish social insurance schemes rather than the more generous French schemes. This gave Vueling a cost advantage.

As required by French law, Vueling reported the fact that it was employing staff posted from abroad to the French authorities. It stated that it had decided to open an office in *Charles de Gaulle* temporarily by way of experiment. In the event, Vueling closed the office in the summer of 2008.

In 2009, the French public prosecutor initiated criminal proceedings against Vueling. The charge was that Vueling had intentionally undertaken a commercial activity in France with the aid of workers who were not affiliated with the French social insurance schemes (so-called "undeclared work"), having hired those workers with the sole intention of having them work on French territory. Twelve of the employees in question, two unions, a pension fund, a public employment agency and a social insurance agency joined in the proceedings as "civil parties".

The court of first instance (*Tribunal de Grande Instance de Bobigny*) acquitted Vueling. The public prosecutor and most of the civil parties appealed.

On appeal, the *Cour d'appel de Paris* overturned the lower court's judgment and ordered Vueling to pay a fine of € 100,000 as well as damages to the civil parties. The Court of Appeal noted, *inter alia*, that (i) Vueling's presence at *Charles de Gaulle* was neither temporary nor experimental; (ii) its management there had a wide degree of autonomy; (iii) there was no "organic link" between the employees and the headquarters in Barcelona (a requirement formulated by the ECJ on the basis of the words "*to which he is normally attached*" in Article 14(1)(a) of Regulation 1408/71); (iv) out of the 80 E101-certificates that had been inspected, 41 described the employees as residing at Vueling's office address in Barcelona and 27 stated either an incorrect address or none at all; (v) the issue of an E101-certificate yields no more than a presumption of affiliation with the relevant (in this case, Spanish) social insurance scheme; and (vi) that fact does not stand in the way of the application of French criminal law. The Court of Appeal dismissed Vueling's alternative argument that it had relied on the validity of the E101-certificates and could therefore not be said to have breached French law intentionally, as charged. It also turned down Vueling's request to refer a question to the ECJ on the matter.

Facts

(easyJet)

EasyJet is also a low cost airline. It is based in the UK. It developed an activity at Orly Airport in Paris, where it hired almost 200 employees, the majority of whom were French citizens

residing in France. These employees were issued with E101-certificates which stated that they were hired in the UK and posted temporarily to France, as a result of which they were governed by British, not French, social security legislation.

As from 1 January 2007, easyJet stopped doing business in the manner described above. It registered its Orly site with the local Companies Register and had its Orly employees join the French social security schemes.

Like Vueling, easyJet was fined for undeclared work (performed before 2007, i.e. in the period 2004-2006) and it appealed. As in the Vueling case, the Paris Court of Appeal found easyJet to be guilty. It held that easyJet's activity at Orly was not temporary but permanent, given that:

the pilots and the cabin crew began and finished their flights;
easyJet advertised its services and offered flights from its Orly site;
easyJet increased its activities and the number of its destinations from Orly in the course of 2003-2006;
easyJet hired its Orly staff locally, even though the E101-certificates stated that they were posted workers;
the "centre of activities" of these employees was in France, where they received their instructions and performed their work.

In view of these circumstances, the Court of Appeal held that the fact that the employees had been issued with E101-certificates was insufficient to exclude them from the French social security system.

Facts

(Ryan Air)

Although this case report is limited to the Supreme Court's judgments in the Vueling and easyJet cases, it is useful to note that on 1 October 2013, the criminal court in Aix en Provence convicted a third budget airline company, the Irish company Ryan Air, of intentionally hiring and employing 127 employees at its Marseille base without registering them with the French social security authorities. Ryan Air was fined € 10.2 million. The case was recently heard on appeal and, according to the press, is likely to end up in the ECJ.

As in the Vueling and easyJet cases, the employees were not affiliated with the French social security scheme, Ryan Air having registered them with the (cheaper) Irish social security scheme.

Ryan Air claimed that:

the Marseille site was not open to the public;
communications with clients were made exclusively through Internet;
no information related to a French address, telephone number or contact was provided;
the offices were used only for administrative tasks;
none of the local employees had management responsibilities;
no employee was supposed to remain at this French site;
the French site was an operating base, whose sole function was the stationing of planes at the airport;
Ryan Air's activity was limited to the boarding and disembarkation of passengers;
the contracts of employment of Ryan Air's employees based in Marseille were subject to Irish law, and they did not work mainly in France, but exercised their activity on planes registered in Ireland, where they were paid;
Ryan Air held E101-certificates;
only 38 employees were employed by Ryan Air, the remainder being employed by two Irish temporary agency companies.

The court did not accept these arguments, holding that:

during four years, from 2007 to 2010, Ryan Air organised and increased the number of flights from France to other destinations;
the activity was stable and continuous and resulted in the hiring of more than 100 employees;
Ryan Air did not stop this activity until it was prosecuted, and later on it resumed the activity with new flights;
the flights from Marseille were regularly advertised to French clients.

The court considered also that the choice of Irish law could not deprive the workers from the benefit of the imperative provisions of French law pursuant to the Treaty of Rome on applicable law. Similarly to the easyJet case, the court considered that the centre of activity of the workers was in France, and not in Ireland, based on the facts that:

workers were hired in France and were under a contractual obligation to reside at a distance of less than 1h30 from the airport;
the start and the end of their services were always at the French airport, where employees had

individual lockers;
all documents relating to the employment of the workers were held on the French premises;
the extranet site organizing the workers' activity was located at the French site;
two employees were located at the site for management responsibilities.

The court also held that the E101-certificates created no more than a presumption, and did not stand in the way of evidence of material facts indicating a breach of French rules.

As regards the employment of the workers through supposed temporary work agencies, the court held that the 56 employees concerned were subject to the same organisation and conditions of work as Ryan Air's own employees, that these 56 employees had no direct or indirect relationship with the temporary work agencies and were directly subordinate to Ryan Air's French manager. The Court held therefore, that the only purpose of the operation was the loan of personnel so as to pay them at a lower level than French employees, which is prohibited by French law.

Judgments

Vueling appealed to the *Cour de cassation* (Supreme Court). It argued, *inter alia*, that the employees' non-affiliation with French social insurance schemes was validated by the fact that it had been issued with E101-certificates in respect of the employees in question, that upon completion of their initial 12 months of employment those employees had either left France or had become affiliated with the French social insurance schemes or - in certain instances - had been issued with E102-certificates with the consent of the relevant French authority (*the Centre des Liaisons Européennes et Internationales de Sécurité Sociale - CLEISS*), that the employees had been properly registered as posted workers with the French authorities, that the *Charles de Gaulle* office lacked autonomy and that therefore the "organic link" between headquarters in Barcelona and the employees had been retained.

The *Cour de cassation* was not impressed with these arguments and upheld the Court of Appeal's conviction. It held, *inter alia*:

that in order to determine whether the employees in question were genuinely posted from Spain to France within the meaning of Regulation 1408/71, it was necessary to make an overall assessment of all the relevant circumstances;
that Regulation 1408/71 implies that there was, at the time of hiring, a direct relationship between the employer and the posted workers, which is maintained during the posting;
that there was no such direct relationship given (a) that Vueling's presence in Charles de Gaulle constituted an "operating base" as defined in the Civil Aviation Code, (b) that Vueling's

activity in Charles de Gaulle was oriented entirely towards the French territory and (c) that that activity was carried out on a regular, stable and continuous basis or through infrastructures located in France;
that the delivery by the Spanish social security authorities of E101-certificates does not evidence the legality of the posting of the workers concerned.

The *Cour de cassation* stated that its decision was in line with the ECJ's case law and that therefore there was no need to refer a question to the ECJ.

The *Cour de cassation* ruled in a roughly similar manner in the easyJet case, but there were differences.

The *Cour de cassation* held that easyJet's activities in France were not of a temporary but of a permanent nature. Therefore, those activities should not be judged according to the rules on free movement of workers (now Articles 45-48 TFEU) but according to those on the right of establishment (now Articles 49-55 TFEU). The relevance of this is that where the right of free movement is involved, the basic principle is that the law of the worker's habitual place of residence continues to apply, whereas a business that makes use of the right of establishment is subject to the law of the place where it is established. Although the criminal charge concerned the illegal use of E101-certificates, the fact that in the Supreme Court's opinion the employment relationships of the Orly staff were governed by French employment law played a role in determining the criminal charge.

Regulation 1408/71 has different rules for non-mobile workers (Article 14(1)) and for "travelling or flying personnel" (Article 14(2)). The latter are subject to the social insurance legislation of the Member State where the employer has its registered office, except where the employees in question are employed by a "branch or permanent representation" in the territory of another Member State, in which case they are covered by the legislation of that state. Thus, the rules provided in Regulation 1408/71 are different for pilots and cabin crew on the one hand and for ground staff on the other. This aspect was addressed in the easyJet case.

Commentary

This ruling is of particular interest in the context of the current reinforcement both in Europe and France of the rules on the posting of workers. The EU implemented a set of rules on posting conditions in Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. The purpose of this directive was to provide for the enforcement and extension of the host Member States' minimum terms and conditions of employment to workers posted by their employer to their territory. The directive did not deal, however, with social security treatment. Indeed, according to EU regulations on social security (Article 14.1.a

of the Regulation 1408/71/EC and Article 12 of Regulation 883/2004/EC on social security), a posted worker remains affiliated to the regime of the posting company's home country This has resulted in fraud and abuses resulting from the location of the posting company in a country with low social security charges.

In France, the transnational posting of workers has been transposed in the French Labour Code under Articles L.1261-1 et seq. Pursuant to these articles, the transnational posting of workers applies in scenarios where an employer, usually based outside of France, gives a specific assignment to its employees which must be carried out in France, with the intention that, once the assignment has been completed, the employees will resume their work in their home country.

A new EU directive with the aim of reinforcing the application of the 1996 Directive and avoiding social dumping was voted on 16 April 2014. France criticised this new directive, arguing that the text does not go far enough to prevent abuses. In particular it does not deal with social security treatment. To prevent social dumping and reinforce its rules relating to clandestine work, the French Parliament is currently debating a bill that not only incorporates the provisions of the new directive, but goes beyond that in terms of additional regulation.

The Vueling case highlights the position the French courts take in this regard, which is to seek to strengthen posting conditions and to extend French protection to employees working within French territory.

These abuses of the application of Directive 96/71/EC do not only concern the airline industry. The French courts have also convicted companies in other sectors when they have considered that posting was not genuine. This was the case in November 2013 when the Court of Appeal of Chambery convicted the building company Promogin for failure to declare work when it used false subcontracting agreements with companies located in Poland sending Polish employees to work in France in breach of French rules.

It is most likely that the French courts will continue to confirm the same position and to convict companies, whether French or foreign, which abuse posting status.

Comments form other jurisdictions

The Netherlands (Peter Vas Nunes): The issue of whether, and to what extent, the social insurance authorities of an "incoming" State (usually countries with generous and therefore expensive social insurance systems) are bound by an E101 – certificate (since 2010: an A1 certificate) issued by the social insurance authorities of an "outgoing" State (usually a country in Eastern or Southern Europe or, long ago, Ireland) has been adjudicated by the ECJ several

times. One of those occasions was in the *Fitzwilliam case* (ECJ 10 February 2000, case C-202/97), which I recall because I acted for the Irish employer. It is worth quoting from that judgment:

"However, the probative force of an E 101 certificate is limited to the competent institution's declaration as to the legislation applicable; it cannot affect the Member States' freedom to organise their own social protection schemes or the way in which they regulate the conditions for affiliation to the various social security schemes, which, as the French Government submits, are matters which remain exclusively within the competence of the Member State concerned.

The principle of sincere cooperation, laid down in Article 5 of the EC Treaty (now Article 10 EC), requires the competent institution to carry out a proper assessment of the facts relevant for the application of the rules relating to the determination of the legislation applicable in the matter of social security and, consequently, to guarantee the correctness of the information contained in an E 101 certificate.

As regards the competent institutions of the Member State to which workers are posted, it is clear from the obligations to cooperate arising from Article 5 of the Treaty that these obligations would not be fulfilled — and the aims of Article 14(1)(a) of Regulation No 1408/71 and Article 11(1)(a) of Regulation No 574/72 would be thwarted — if the institutions of that Member State were to consider that they were not bound by the certificate and also made those workers subject to their own social security system.

Consequently, in so far as an E 101 certificate establishes a presumption that posted workers are properly affiliated to the social security system of the Member State in which the undertaking providing temporary personnel is established, such a certificate is binding on the competent institution of the Member State to which those workers are posted.

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 system is applicable and would consequently impair legal certainty. In cases in which it was difficult to determine the system applicable, each of the competent institutions of the two Member States concerned would be inclined to take the view, to the detriment of the workers concerned, that their own social security system was applicable to them.

Consequently, as long as an E 101 certificate is not withdrawn or declared invalid, the competent institution of a Member State to which workers are posted must take account of the fact that those workers are already subject to the social security legislation of the State in which the undertaking employing them is established and that institution cannot therefore subject the workers in question to its own social security system.

However, it is incumbent on the competent institution of the Member State which issued the E 101 certificate to reconsider the grounds for its issue and, if necessary, withdraw the certificate if the competent institution of the Member State to which the workers are posted expresses doubts as to the correctness of the facts on which the certificate is based and, consequently, of the information contained therein, in particular because the information does not correspond to the requirements of Article 14(l)(a) of Regulation No 1408/71.

Should the institutions concerned not reach agreement on, in particular, the question how the particular facts of a specific case are to be assessed and consequently on the question whether it is covered by Article 14(1)(a) of Regulation No 1408/71, it is open to them to refer the matter to the Administrative Commission.

If the Administrative Commission does not succeed in reconciling the points of view of the competent institutions on the question of the legislation applicable, the Member State to which the workers concerned are posted may, without prejudice to any legal remedies existing in the Member State to which the issuing institution belongs, at least bring infringement proceedings under Article 170 of the EC Treaty (now Article 227 EC) in order to enable the Court to examine in those proceedings the question of the legislation applicable to those workers and, consequently, the correctness of the information contained in the E 101 certificate.

It is clear from all the foregoing considerations that Article 11 (1)(a) of Regulation No 574/72 is to be interpreted as meaning that a certificate issued by the institution designated by the competent authority of a Member State is binding on the social security institutions of other Member States in so far as it certifies that workers posted by an undertaking providing temporary personnel are covered by the social security system of the Member State in which that undertaking is established. However, where the institutions of other Member States raise doubts as to the correctness of the facts on which the certificate is based or as to the legal assessment of those facts and, consequently, as to the conformity of the information contained in the certificate with Regulation No 1408/71 and in particular with Article 14(1)(a) thereof, the issuing institution must re-examine the grounds on which the certificate was issued and, where appropriate, withdraw it."

In light of this ruling by the ECJ, which to my knowledge has not been repealed or superseded by new legislation, I am amazed and disappointed that the French Supreme Court saw no need to refer a question to the ECJ. Vueling and easyJet will now need to attempt to recover the Spanish and British social insurance contributions they paid.

Subject: Private international law, Posting of workers and expatriates

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Parties: Vueling Airlines – v – France and easyJet – v - France

Court: Cour de Cassation Chambre Criminelle (Supreme Court, criminal division)

Date: 11 March 2014

Case Numbers: 12-81.461 (Vueling) and 11-88.420 (easyJet)

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