SUMMARY

2018/17 Social dumping considerations are not relevant to whether the competent authority should issue A1-certificates (PL)

<p>The Polish national social insurance authority has no power to police ‘social dumping’. Neither is there any legal basis or justification for excluding workers performing work in other EU Member States from the national social insurance system based on an unverifiable assumption that social dumping is taking place.</p>

Facts

The claimant in this case was a Polish temporary employment agency. Early in 2012, it made an arrangement with a French company to send three Polish temporary workers to work for that company in various EU Member States for a limited period. The agency applied to the Polish social insurance authority for A1-certificates on behalf of one of the temporary workers, who was to work in France during the first quarter of 2013.

The social insurance authority refused to issue the A1-certificates. The agency successfully challenged this decision in a regional court. However, the social insurance authority appealed and had the decision overturned . The Court of Appeal determined that, during the period when the temporary worker was to work in France, the agency was carrying out its activities, had its staff and did its accounts in Poland. When the employment contract for the temporary worker was made, the agency was generating 16% of its turnover from its operations in Poland. At the time, the agency employed 116 workers in Poland and posted 173 persons to work abroad. The Court quoted Articles 12(1) and 14(1) and (2) of Regulation 883/2004 (the Coordination Regulation) and Regulation 987/2009 (the Implementation Regulation) and

concluded that the place of activity of the employer should be determined by:

the volume of turnover achieved locally and abroad;
the number of workers who work abroad, apart from administrative and managerial employees; and
the number of contracts made as part of its operations in the countries in question.

The Court of Appeal also held that there must be a link between the employer and the Member State in which it has its seat. Turnover by an agency in the country in which it has its seat should be at least 25% and if it is lower, an in-depth analysis of the number of workers employed locally and abroad and the number of agreements executed locally and abroad is needed. As the agency's turnover in Poland was approximately 16% of its total, the Court of Appeal held that the agency did not conduct a significant part of its business in Poland. Consequently, it found the authority had acted correctly in not issuing the A1 certificates.

The agency then appealed to the Supreme Court. It argued that the Court of Appeal had broken the law, by erroneously holding that the posted employees had not met the requirements of Article 12(1) of the Coordination Regulation, and that they should be covered by the Polish social insurance system whilst temporarily working in France.

Judgment

The Supreme Court overturned the Court of Appeal's judgment. It held that current jurisprudence stated convincingly that the stiff requirement to achieve at least 25% of turnover from local operations, does not play a primary role. It is not essential for the company to conduct a significant proportion of its operations in the home country to be covered by the social security system of that country. Both objective and subjective factors should be assessed to determine whether a business has a significant local operation. This cannot be limited to a comparison of turnover in various Member States. Moreover, in the case at hand, the turnover comparison was not decisive for the following reasons:

it was unclear and ill-defined;
it ignored that all costs were attributed to Poland, though some were connected to work performed abroad;
turnover in Poland and more developed EU Member States could not properly be compared, as turnover in these Member States would appear higher simply because of higher pricing; most countries had a higher minimum wage, sometimes more than four times higher.

According to the Supreme Court, posted workers should fall within the Polish social insurance scheme if the facts demonstrated that a significant, (not marginal) number of workers employed by the agency had worked on a significant number of projects within Poland, whether the ratio between local turnover and international turnover was above or below 25%. Only if the employer's activities in Poland were limited to internal management activities should one expect that workers posted to other EU member states would not be subject to Polish social insurance legislation.

The Supreme Court also stated that the existence of obvious differences in the purchasing power of the national currency and the value of the Euro may lead to a distortion in comparing local and international turnover and that this should always be taken into account.

The judgment also contained an interesting remark about the responsibilities of the social insurance authority in issuing, or refusing to issue A1-certificates. The Supreme Court noted that social insurance authorities do not have the power to police the issue of 'social dumping'. Neither is there any legal basis for excluding posted workers from coverage based on unverifiable assumptions that social dumping is taking place. Nor are justifications based on lower social insurance costs in the home than the host country acceptable, particularly if the authorities in the host country have no hard evidence of dumping.

The overturning of the judgment of the Court of Appeal means that the Polish social insurance authority is now required to issue A1-certificates to the effect that the workers are covered by Polish social insurance for the time they worked in France.

Commentary

The Supreme Court's statement to the effect that the social insurance authority responsible for issuing the A1 certificate does not have the power to police the issue of social dumping seems particularly relevant in the context of certain destination countries. It seems that the Supreme Court provides such authorities (certainly, the Polish Social insurance Office) with an important tool for resisting any such pressure.

Moreover, the Supreme Court stated that economic freedom and freedom of movement appear to be in conflict with the requirement to consider local and international turnover ratios in relation to A1-certificates.

What is also clear is that if foreign social insurance schemes to apply to workers, this would lead to a fragmentation of social insurance and much complication for workers, who might need to juggle numerous foreign social insurance authorities just for small benefits based on short postings in various EU Member States. Not a joined-up state of affairs.

Comment from other jurisdiction

Austria (Dr. Erika Kovács, Vienna University of Economics and Business): For Austria, as predominantly a destination country for posted workers, the conditions under which A1 certificates are issued by the competent authorities in home countries are of great relevance.

The ECJ has stated in several judgments (*FTS, A-Rosa Flussschiff and Herbosch-Kiere*), that it is the national authority's responsibility to carry out a proper assessment of the facts relevant to apply the rules on posting workers and to guarantee the correctness of the information contained in an A1 (E 101) certificate (*FTS* judgment, C-202/97. paragraph 51; *Herbosch-Kiere*, C-2/05, paragraph 22; *A-Rosa Flussschiff GmbH*, C-620/15, paragraph 39.) The principle of cooperation in good faith laid down in Article 4(3) TEU requires the issuing institution to ensure the information contained in the A1 certificate is correct. The ECJ has also clarified that the host Member State cannot call the validity of a certificate into question. Consequently, an A1 certificate has the serious consequence that it is binding on the competent institution of the Member State to which a worker is posted, provided it has not been withdrawn or declared invalid by the issuing authority. Therefore, for destination countries it is extremely important to be able to trust the facts on which an A1 certificate is based.

Article 14 of Regulation 987/2009 is relevant to how to determine whether an employer normally carries out its activities in a given Member State. The criteria laid down in that Article are directly binding on national courts.

The Polish Supreme Court has stated that neither the 25% threshold of turnover nor the carrying out of a significant part of the operation in the home country are essential for coverage by the social security system. The decisive factor is whether the employer employs a significant number of workers in the home country as well. However, these arguments seem questionable in terms of their conformity with the European law.

Meanwhile, there is little Member States can do to combat faked postings. For example, the Austrian Job Centre only issues an approval of a posting (EU-Entsendebestätigung) if the worker is posted to Austria from Croatia or a third country. In the course of issuing this approval, the Job Centre investigates whether it is a genuine posting. The Austrian Supreme Administrative Court has declared that a posting can be prohibited if the activity indicated proves not to be a posting within the meaning of Article 1(3)(a) of Directive 96/71 and §18(12) of the Act on the Employment of Foreigners (Ausländerbeschäftigungsgesetz) (Judgment of the Supreme Administrative Court, 19 March 2014, GZ 2013/09/0159). The first step of the assessment is to check the seat of the business of the sending company in the home country. It is crucial that the firm has considerable business activity in the home country. In addition,

whether the posted worker usually performs his or her work in the home country and the posting to the host country is only temporary must be checked (Federal Administrative Court, Bundesverwaltungsgericht, 14 January 2015, L512 2015325-1). However, this procedure only applies to workers posted from non-EU countries to Austria. In the case of posted workers from EU Member States to Austria, there is no particular verification and therefore it is vital that the facts are thoroughly examined in the home country.

Subject: free movement (social insurance)

Parties: W – v – Zakład Ubezpieczeń społecznych

Court: *Sąd Najwyższy* (Supreme Court)

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