

SUMMARY

ECJ 6 February 2018, C-359/16 (Altun), Free movement, Social insurance

<p>A Member State to which workers have been posted may, in the case of fraud and under certain conditions, ask the courts to disregard an A1 certificate and apply its own social security legislation, including the recovery of contributions.</p>

Summary

A Member State to which workers have been posted may, in the case of fraud and under certain conditions, ask the courts to disregard an A1 certificate and apply its own social security legislation, including the recovery of contributions.

Legal framework

This request for a preliminary ruling concerns the interpretation of EU social security legislation. Until 1 May 2010, the social coordination system was regulated by Regulation (EC) 1408/71. This Regulation was repealed and replaced by Regulation (EC) 883/2004. Even though the case concerns the old Regulation, it is also relevant to the legal instruments that are currently in place.

In order to determine which Member State legislation a migrant person is subject to, Title II of both Regulation provides a system of conflict rules. The basis of these rules of conflict is the territorial application of the social security law of the Member State where the work is carried out: the State-of-employment principle (Article 13 Regulation 1408/71 and Article 11 Regulation 883/2004). Thus, a person employed in the territory of one Member State shall be subject to the social security legislation of that State, even if he resides in the territory of another Member State or his employer is registered in another Member State.

However, there are a number of exceptions and special rules. There are, for example, special rules applicable to posted workers. When a worker is posted by his employer to pursue

activities temporarily on behalf of his employer in another Member State he or she remains, pursuant to Article 14 Regulation 1408/71 and Article 12 Regulation 883/2004, subject to the social security legislation of the Member State in which they normally pursue their activities. The anticipated duration of that work should not exceed 12 months, and the posted worker should not be sent to replace another person who has completed his or her term of posting.

In order to guarantee the correct application of these rules, there are other Regulations (such as Regulation 574/72, particularly Article 11) that contain a system of control measures. In this regard, the Portable Document (PD) A1 (formerly the E101 certificate) plays a key role. This is a document issued by the competent body of a Member State which proves that the persons concerned remain subject to the legislation of that Member State.

The body issuing the document is obliged to assess the facts correctly and check the accuracy of the data that have been entered. Sometimes, the competent body of another Member State – more specifically, of the Member State where the posted person temporarily carries out activities – disputes that the conditions have been met. As long as the A1 certificate has not been withdrawn or declared invalid, the competent body of the receiving Member State should accept the document and must take into account that the workers concerned are already subject to the legislation of another State, meaning that it may not subject them to its own social security legislation. In the case of a dispute between the competent bodies of Member States on whether or not the certificate had been issued correctly, they must actually contact each other. At the request of the body of the receiving State the body of the sending State must re-examine whether or not the issued A1 certificate was correct and, if necessary, withdraw it. If they cannot reach an agreement, the Member States concerned can submit their dispute to the Administrative Commission (a Commission consisting of a government representative from each of the Member States).

Facts

During the course of an investigation into the employment staff of Absa – a Belgian company active in the construction sector – the Belgian Social Security Inspectorate found that the company employed practically no staff and subcontracted the work at all sites to Bulgarian undertakings which posted workers to Belgium. The use of the workers concerned was not declared to the institution responsible for the collection of social security contributions in Belgium since they had A1 or E101 certificates issued by the competent Bulgarian institution confirming that they were registered with the Bulgarian social security system.

A judicial investigation conducted in Bulgaria through letters rogatory, ordered by a Belgian investigating magistrate, found that the Bulgarian undertakings carried out no significant

activity in Bulgaria. The Belgian authorities therefore made a reasoned request to the competent Bulgarian institution for review or withdrawal of the certificates in question. In its response, the competent Bulgarian institution gave a summary of the certificates issued, but did not take into account the facts established by the Belgian authorities. The Belgian authorities then began legal proceedings against the Belgian company's senior management.

National proceedings

By a judgment of 10 September 2015, the Court of Appeal in Antwerp (Belgium) convicted the defendants. While the court acknowledged that a certificate had been issued for each of the posted workers, it nevertheless considered that it was not bound by those circumstances since those certificates had been obtained fraudulently.

The Court of Cassation, hearing the case on appeal, decided to refer a question to the Court of Justice for a preliminary ruling. It sought to establish whether the courts of the host Member State may annul or disregard an E 101 certificate when the facts submitted for assessment by it support the conclusion that the certificate was fraudulently obtained or relied on.

Questions put to the ECJ

Should Article 14(1)(a) of Regulation No 1408/71 and Article 11(1)(a) of Regulation No 574/72 be interpreted as meaning that, when a worker employed by an undertaking established in the territory of a Member State is posted to the territory of another Member State, a court of the latter Member State may disregard an E101 certificate issued under the latter provision, when the facts submitted for assessment by it support the conclusion that the certificate was fraudulently obtained or relied on?

ECJ's findings

Even though the ECJ confirmed its previous case law on the validity of E101 certificates (Herbosch Kiere, C-2/05 and A-Rosa Flussschiff, C-620/15), it added that this must not result in individuals being able to rely on EU law for abusive or fraudulent ends. The ECJ confirmed that the principle of prohibition of fraud and abuse of rights, is a general principle of EU law which individuals must comply with.

The Court clarified that findings of fraud are to be based on a consistent body of evidence that satisfies both an objective and a subjective factor. The objective factor consists in the fact that the conditions for obtaining and relying on an E101 certificate are not met. The subjective factor corresponds to the intention of the parties concerned to evade or circumvent the conditions for the issue of that certificate, with a view to obtaining the advantage attached to

it. The fraudulent procurement of an E101 certificate may thus result from a deliberate action, such as the misrepresentation of the real situation of the posted worker or of the undertaking posting that worker, or from a deliberate omission, such as the concealment of relevant information, with the intention of evading the conditions governing the posting provisions.

If the institution of the Member State to which the workers have been posted puts before the institution that issued the E101 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. However, 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. The persons who are alleged, in such proceedings, to have used posted workers ostensibly covered by fraudulently obtained certificates must, however, be given the opportunity to rebut the evidence on which those proceedings are based 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.

The ECJ concluded that, in the case at hand, since the Belgian institution had made an application to its Bulgarian counterpart for review and withdrawal of those certificates in the light of evidence collected during a judicial investigation that supported the conclusion that those certificates were fraudulently obtained or relied on, and the issuing institution failed to take that evidence into consideration, the national court may disregard those certificates. The court must also 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.

Ruling

When an institution of a Member State to which workers have been posted makes an application to the institution that issued E101 certificates for the review and withdrawal of those certificates in the light of evidence collected in the course of a judicial investigation, which supports the conclusion that those certificates were fraudulently obtained or relied on, and the issuing institution fails to take that evidence into consideration for the purpose of reviewing the grounds for the issue of those certificates, a national court may, in the context of proceedings brought against persons suspected of having used posted workers ostensibly covered by such certificates, disregard those certificates if, on the basis of that evidence and with due regard to the safeguards inherent in the right to a fair trial which must be granted to

those persons, it finds the existence of such fraud.

Creator: European Court of Justice (ECJ)

Verdict at: 2018-02-06

Case number: C-359/16 (Altun)