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Court of Justice of the European Union

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Judgment in Case C-359/16

Ömer Altun and Others

## **National courts may, in cases of fraud, disregard social security certificates issued to workers posted within the EU**

*This is the case if the issuing institution fails to carry out a review of the certificate within a reasonable period of time in the light of evidence of fraud that has been brought to its attention*

During the course of an investigation into the employment of staff of 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 its 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 E 101 or A 1 certificates issued by the competent Bulgarian institution confirming that they were registered with the Bulgarian social security system.<sup>1</sup>

A judicial investigation conducted in Bulgaria through letters rogatory, ordered by a Belgian investigating magistrate, found that those 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. By judgment of 10 September 2015, the Hof van beroep Antwerpen (Court of Appeal, 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 Hof van Cassatie (Court of Cassation, Belgium), 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.

In today's judgment, the Court recalls its case-law<sup>2</sup> according to which the principle of sincere cooperation requires the issuing institution to carry out a proper assessment of the relevant facts and to ensure that the information contained in that certificate is accurate. The principle also implies that of mutual trust: the certificate establishes a presumption that the worker concerned is properly registered and, consequently, is binding, in principle, on the competent institution of the host Member State. Therefore, as long as an E 101 certificate is not withdrawn or declared invalid, the competent institution of the host Member State must take account of the fact that the worker is already subject to the social security legislation of the Member State in which the undertaking

<sup>1</sup> The E 101 certificate is a standard form drafted by the Administrative Commission on Social Security for Migrant Workers, attached to the European Commission. From 1 May 2010 the E 101 certificate became the portable document A1 in accordance with Regulation (EC) Nos 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 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).

<sup>2</sup> Cases: [C-2/05](#) Herbosch Kiere and [C-620/15](#) A-Rosa Flussschiff..

employing him is established, and that institution cannot, therefore, subject the worker in question to its own social security system.

However, it also follows from the principle of sincere cooperation that any institution of a Member State must carry out a diligent examination of the application of its own social security system. As a result, the competent institution of the Member State which issued the certificate must reconsider the grounds for its issue and, if appropriate, withdraw the certificate, if the competent institution of the host Member State expresses doubts as to the accuracy of the facts on which the certificate is based.

The Court notes that, in such circumstances, 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 E 101 certificate (notably bringing it before the Administrative Commission), must be complied with.

**Such considerations must not, however, lead to individuals being able to rely on EU law for abusive or fraudulent ends, that being a general principle of EU law.**

Thus, if the institution which issued the certificate fails to carry out such a review within a reasonable period of time, it must be possible for the evidence of fraud to be relied on in judicial proceedings, in order to satisfy the court of the host Member State that the certificates should be disregarded.

The Court notes, however, that those 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.

The court concludes that, in the present case, since the Belgian institution 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 supports 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**. That 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.

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**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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Press contact: Holly Gallagher ☎ (+352) 4303 3355

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