

Case C-410/21**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

5 July 2021

Referring court:

Hof van Cassatie (Belgium)

Date of the decision to refer:

29 June 2021

Appellants:

FU

DRV Intertrans BV

Respondent:

Openbaar Ministerie

Subject matter of the main proceedings

The main proceedings concern the appeal in cassation brought by FU and DRV Intertrans BV before the referring court against the judgment of 11 February 2021 of the hof van beroep te Antwerpen (correctionele kamer) (Antwerp Court of Appeal (Criminal Chamber)) which found them guilty, inter alia, of fraud and imposed a penalty on them.

Subject matter and legal basis of the request

In this request for a preliminary ruling under Article 267 TFEU, the referring court asks the Court of Justice of the European Union ('the Court of Justice'), in essence, what the legal value is of an A1 document which has been provisionally withdrawn by the issuing Member State pending criminal proceedings in the Member State of employment and whether the acquisition of a road transport licence in a Member State demonstrates that the undertaking concerned has established an effective and stable head office in that Member State within the

meaning of Article 13 of Regulation No 883/2004/EC, on the basis of which the applicable social security scheme can be determined.

Question referred for a preliminary ruling

1. Must 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 (EC) No 883/2004 on the coordination of social security systems to be interpreted as meaning that:

- if, following a request by the authorities of the Member State of employment for the retroactive withdrawal of the ‘A1’ certificates, the authorities of the Member State which issued those A1 certificates confine themselves to withdrawing those certificates provisionally, stating that they no longer have any binding force, so that the criminal proceedings in the Member State of employment can continue, and that a final decision will only be taken by the Member State that issued the A1 certificates once the criminal proceedings in the Member State of employment have been finally concluded, the presumption attached to the A1 certificates that the workers concerned are properly affiliated to the social security system of that issuing Member State ceases to apply and those A1 certificates are no longer binding on the authorities of the Member State of employment;
- if the answer to that question is in the negative, the authorities of the Member State of employment may, in the light of the case-law of the Court of Justice of the European Union, disregard the A1 certificates at issue on the grounds of fraud?

2. Must Article 13(1)(b)(i) of Regulation (EC) No 883/2004 of 29 April 2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, Articles (3)(1)(a) and 11(1) of Regulation (EC) No 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC and Article (4)(1)(a) of Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market be interpreted as meaning that it necessarily follows from the fact that an undertaking which obtains a road transport authorisation in a Member State of the European Union pursuant to Regulation (EC) No 1071/2009 and Regulation (EC) No 1072/2009 and which therefore must have an effective and stable establishment in that Member State, that it has been irrefutably demonstrated that its registered office is established in that Member State, as referred to in Article 13(1) of the aforementioned Regulation No 883/2004/EC, for the purposes of determining the applicable social security system and that the authorities of the Member State of employment are bound by that determination?

Provisions of European Union law relied on

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), Article 13.

Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1), Article 5.

Regulation (EC) No 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC (OJ 2009 L 300, p. 51), Articles 3 and 11.

Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market (OJ 2009 L 300, p. 72), Article 4.

Provisions of national law relied on

Article 66 Strafwetboek (Criminal Code)

Article 235 Sociaal Strafwetboek (Social Criminal Code)

Succinct presentation of the facts and procedure in the main proceedings

- 1 FU is the manager of DRV Intertrans BV, which has its registered office in Belgium and operates in the transport sector. FU's spouse is the manager of Immo-Des BV, which has its registered office in Belgium and owns an industrial building (with, inter alia, parking, maintenance and tank facilities). FU officially resides at an address in the Grand Duchy of Luxembourg where the head office of the transport company Mic Cargo Sarl is also situated. FU and his wife have also established the company Md Intercargo sro, which also operates in the transport sector, in Slovakia.
- 2 Investigations have shown, however, that both the Luxembourg and Slovak companies are in fact managed from Belgium and that most of the transport activities are carried out in Belgium. According to the Belgian Sociale Inspectie (Social Inspectorate; 'Sociale Inspectie'), the Slovak company was set up as a subcontractor of DRV Intertrans BV and the Luxembourg company Mic Cargo sarl for the purpose of creating a cheap labour force through the secondment of workers. However, according to the Sociale Inspectie, this activity focuses exclusively on the Belgian market without any relevant activity in Slovakia, the country of formal establishment.

- 3 In the light of the foregoing, FU and DRV Intertrans BV were summoned to appear before the correctionele rechtbank West-Vlaanderen, afdeling Brugge (West Flanders Criminal Court, Bruges Division) on charges, inter alia, of fraud. In order to avoid having to pay social security contributions to the Rijksdienst voor Sociale Zekerheid (National Social Security Office), they had falsely claimed that the employees in question had been posted to Belgium by a Slovakian company, whereas that company does not in fact have its head office in Slovakia or at least does not carry out any substantial activity in Slovakia (Article 66 of the Criminal Code and Article 235 of the Social Security Code).
- 4 While those criminal proceedings were in progress, the Belgian authorities asked the Slovak authorities to retroactively withdraw the A1 posting documents that they had issued. The Slovak authorities then provisionally withdrew all the documents, stating that those documents no longer had any binding force so that the Belgian criminal proceedings could continue and that they would only take a final decision on the legislation applicable to the workers concerned once those proceedings had been concluded.
- 5 In a judgment of 11 February 2021, the Antwerp Court of Appeal (Criminal Chamber) found FU and DRV Intertrans BV guilty of fraud (inter alia), and sentenced them on, inter alia, the following grounds:
 - The A1 secondment documents issued were provisionally withdrawn by the Slovak authorities and are not binding. The suspension of those documents means that they have no evidential value with regard to the applicable social security system.
 - A Community transport licence which has not been withdrawn has no bearing on the applicable social security system and does not result in the Court of Appeal being obliged to assume that, as far as social security is concerned, Md Intercargo sro had an effective and stable establishment in Slovakia.
- 6 FU and DRV Intertrans BV have lodged an appeal in cassation before the referring court against that judgment.

Essential arguments of the parties in the main proceedings

First question

- 7 According to FU and DRV Intertrans BV, that judgment infringes Article 5 of Regulation No 987/2009 because it has wrongly held that the A1 documents of the employees concerned have been suspended and therefore no longer have any value. That article does not allow the issuing Member State, in this case Slovakia, to withdraw or suspend an A1 document provisionally, pending the outcome of legal proceedings in another Member State. Under that provision, an issuing country can only maintain, withdraw or declare invalid an A1 document.

Second question

- 8 According to FU and DRV Intertrans BV, the judgment has incorrectly held that obtaining an authorisation in a Member State pursuant to the scheme provided for in Regulations No 1071/2009 and No 1072/2009 does not constitute proof that the undertaking has an effective and stable establishment in that Member State. The judgment also fails to recognise the irrefutable nature of that proof, since only the issuing Member State has the power to penalise any infringements and to withdraw the authorisation. Furthermore, the judgment wrongly fails to recognise the link between that proof and the concept of the registered office in Article 13(1) of Regulation No 883/2004, in particular when assessing the registered office of the employer.

Succinct presentation of the reasoning in the request for a preliminary ruling*First question*

- 9 Article 5 of Regulation No 987/2009 determines the legal value of a document and supporting evidence issued in another Member State. Pursuant to that provision, such a document is binding on the Member State of employment as long as the issuing Member State has not withdrawn it or declared it invalid. Where there is doubt about the validity or accuracy of the document, the Member State of employment must ask the issuing Member State for the necessary clarification and, where appropriate, the withdrawal of the document. Where appropriate, the issuing Member State must reconsider the grounds for issuing the document and, if necessary, withdraw it.
- 10 It is clear, *inter alia*, from the case-law of the Court of Justice that an A1 certificate establishes a presumption of proper affiliation to the social security scheme of the issuing Member State (judgment of 26 January 2006, *Herbosch Kiere NV*, Case C-2/05, EU:C:2006:69). Such a certificate is in principle binding on a court of the Member State of employment, which is not entitled to scrutinise its validity. (judgments of 10 February 2000, *Fitzwilliam Executive Search Ltd*, C-202/97, EU:C:2000:75; 27 April 2017, *A-Rosa Flussschiff GmbH*, C-620/15, EU:C:2017:309 and 6 February 2018, *Altun*, C-359/16, EU:C:2018:63).
- 11 The question therefore arises whether this presumption of proper affiliation and the binding nature of such a certificate cease to apply if, as in the present case, following a request for withdrawal, the issuing Member State provisionally withdraws the A1 certificates concerned, stating that they no longer have any binding force, so that the criminal proceedings in the Member State of employment can continue and that it would only take a definitive position in that regard after those criminal proceedings have been finally concluded. If not, the question arises whether the Member State of employment may, in the light of the case-law of the Court of Justice, disregard the certificates in question on the grounds of fraud.

- 12 The referring court is of the view that an interpretation of the aforementioned provision of European Union law is required in order for a ruling to be given.

Second question

- 13 Under Article 13(1)(b)(i) of Regulation No 883/2004, a person who is employed by one undertaking or employer, in more than one Member State, and does not pursue a substantial part of his/her activity in the Member State of residence, will be subject to the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated. Under Articles 3(1)(a) and 11(1) of Regulation No 1071/2009, a transport undertaking must have an effective and stable establishment in a Member State in order to be authorised to engage in the occupation of road transport operator. Under Article 4(1)(a) of Regulation 1072/2009, a Member State will issue a Community licence to a haulier carrying goods by road for hire or reward and who is established in that Member State in accordance with Community legislation and the national legislation of that Member State.
- 14 The question then also arises whether it follows indisputably from the fact that an undertaking obtains an authorisation in a Member State pursuant to Regulation No 1071/2009 and Regulation No 1072/2009 and must therefore have an effective and stable establishment in that Member State, that the undertaking in question is also considered, in respect of social security, to be established in that Member State within the meaning of Article 13 of Regulation No 883/2004, which would then make it possible to determine the applicable social security system, and whether the Member State of employment would be bound by that.
- 15 The referring court is of the view that an interpretation of the aforementioned provision of European Union law is required in order for a ruling to be given.