

Anonymised version

Translation

C-421/23 – 1

Case C-421/23

Request for a preliminary ruling

Date lodged:

10 July 2023

Referring court:

Cour d'appel de Liège (Belgium)

Date of the decision to refer:

25 May 2023

Appellant:

Ministère public

Civil party:

Office National de Sécurité Sociale (ONSS)

Accused person:

EX

[...]

Cour d'appel de Liège (Court of Appeal, Liège, Belgium)

Judgment

delivered by the SIXTH Criminal Division

IN THE CASE OF:

MINISTÈRE PUBLIC (Public Prosecution Service, Belgium)

AND

ONSS (National Social Security Office, Belgium) [...]

- civil party and voluntary intervener

[...]

v

[EX], [...] of Portuguese nationality, without a known address in Belgium, formerly residing at [...] Barcelos (PORTUGAL), declares that he currently resides [...] at 4490 PÓVOA DE VARZIM (PORTUGAL)

- accused person

present and represented by Steve LAMBERT, lawyer in BRUSSELS

Charged with:

[...]

A. [...]. [Charge not covered by the notice of appeal]

B. [...]. [Charge not covered by the notice of appeal]

C. Non-payment of social security contributions following a refusal to file a declaration

In [his] capacity as employer or agent:

[...]

Having paid less in contributions than the amount he is liable for, or having failed to pay contributions following an omission or refusal to file a declaration or to provide the information referred to in paragraph 2, or an act provided for in Articles 232 and 235.

Between 31 January 2012 and 31 January 2018, having failed to pay, as employer or agent, the contributions due in respect of the employment of staff effectively employed in Belgium on behalf of the 10th and 11th accused persons, that is to say the 640 workers who were fraudulently posted from Portugal to Belgium.

[...]

D. [...]. [Charge not covered by the notice of appeal]

E. Swindling under social criminal law

[...]

In the present case, [...]

[...]

- having used forged posting forms and forged posting agreements with a view to carrying out fraudulent postings of workers from the companies in order to give the appearance of legality to the postings of workers, and forged invoices in order to conceal the fraudulent nature of the posting;

[...]

F. [...]

[...]

[...] [Charge not covered by the notice of appeal]

G. [...]

[...]

[...] [Charge not covered by the notice of appeal]

H. Money laundering (related)

[...]

Having converted or transferred the property referred to in Article 42(3) of the Code pénal (Belgian Criminal Code), for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the offence from which that property derives to evade the legal consequences of his actions.

Having concealed or disguised the true nature, source, location, disposition, movement or ownership of the property referred to in Article 42(3) of the Belgian Criminal Code, when they knew or ought to have known the origin.

Having regard to the judgment delivered on **10 November 2021** (Order No 989) by the tribunal de première instance de **NAMUR** (Court of First Instance, Namur, Belgium), **NAMUR** division, which:

IN THE CRIMINAL PROCEEDINGS:

UPHOLDS the charges A, B, C, D.1, D.2, D.3, E, F, G.1 and H, as worded;

SENTENCES the accused person:

- to a term of **imprisonment of four YEARS** and a **fine of EUR 100 000 x 6**, and therefore a total of **EUR 600 000**, or an additional three months'

imprisonment, **suspended** for **five years** for half of the term of imprisonment and of the fine;

- [...] [additional penalties, not relevant to the questions referred for a preliminary ruling]

HEREBY ORDERS:

- the **confiscation** of the sum of EUR 15 461 997.38.

and orders such sum to be awarded to the ONSS.

- [...] [other confiscations, not relevant to the questions referred for a preliminary ruling]

IN THE CIVIL PROCEEDINGS:

[...]

The application of the ONSS to join the criminal proceedings as a civil party is admissible and well-founded for the provisional amount of EUR 15 978 913.72.

[...]

[...]

FOLLOWING DELIBERATIONS

1. Procedure

The appeals of the accused person [EX] and those of the Belgian Public Prosecution Service against the accused person are admissible since they were submitted in the form and within the time limit prescribed by law.

The accused person contests his guilt in respect of charges C, E and H, the level of the sentence and the orders for payment of damages.

The prosecution objects to the level of the sentence.

2. Assessment

Facts

The Court of First Instance, Namur, has accurately set out the facts of the case.

It is sufficient for the Court of Appeal, Liège, to note that the accused person was proved to have employed, through Belgian, Portuguese, English and Luxembourg

companies, 650 workers of Portuguese nationality in the construction sector in Belgium.

Only charges C (non-payment of social security contributions), E (swindling under social criminal law) and H (money laundering) are contested before the Court of Appeal, Liège. It therefore observes that Portuguese workers were posted to Belgium during the years 2011 to 2017, under cover of forged A1 certificates, to be employed on construction sites in Belgium.

The Court of First Instance, Namur, held that the A1 certificates and the posting agreements – covered by charges D1 and D2, not challenged before the court – were forgeries.

However, posting certificates must be requested from the Portuguese social security authorities and issued by them to allow the workers covered by those certificates to remain subject to social security in their country of origin.

In addition, for those workers to be posted to another EU Member State, the employer must have a substantial activity in the State in which it is established. Moreover, the maximum duration of the posting is 24 months.

Substance

In the first ground of appeal, the accused person submits that, as soon as the competent institution of the host Member State raises doubts as to the accuracy of the facts on the basis of which the A1 certificates were issued, it is for the competent social security institution of the Member State that issued those certificates to assess their merits.

It is established that as long as an A1 certificate is not withdrawn or declared invalid, the competent institution of the Member State in which an employee actually works must take account of the fact that that person is already subject to the social security legislation of the Member State in which the undertaking employing him is established, and that institution cannot therefore subject the worker in question to its own social security system. ¹

The Court of Justice of the European Union notes that it follows from the principle of sincere cooperation that every institution of a Member State must carry out a proper assessment of the application of its own social security regime. It also follows from this principle that institutions of the other Member States are entitled to expect that the institution of the Member State concerned fulfils that obligation. ²

¹ Judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309, paragraph 43 and the case-law cited).

² See, by analogy, judgment of 3 March 2016, *Commission v Malta* (C-12/14, EU:C:2016:135, paragraph 37).

As a result, it is incumbent on the competent institution of the Member State which issued the A1 certificate to reconsider the grounds for its issue and, if appropriate, to withdraw the certificate if the competent institution of the Member State in which the employee actually works expresses doubts as to the accuracy of the facts on which the certificate is based and, consequently, of the information contained therein, in particular because that information does not meet the requirements of Article 14(1)(a) of Regulation No 1408/71 (now Regulation No 883/2004).³

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 states that:

‘1. Documents issued by the institution of a Member State and showing the position of a person for the purposes of the application of the basic Regulation and of the implementing Regulation, and supporting evidence on the basis of which the documents have been issued, shall be accepted by the institutions of the other Member States for as long as they have not been withdrawn or declared to be invalid by the Member State in which they were issued.

2. Where there is doubt about the validity of a document or the accuracy of the facts on which the particulars contained therein are based, the institution of the Member State that receives the document shall ask the issuing institution for the necessary clarification and, where appropriate, the withdrawal of that document. The issuing institution shall reconsider the grounds for issuing the document and, if necessary, withdraw it.’

By that certificate, the competent institution of the Member State in which an undertaking employing the workers concerned is established declares that its own social security system remains applicable to those workers. As previously mentioned, by virtue of the principle that workers must be covered by only one social security system, the certificate thus necessarily implies that another Member State’s social security system cannot apply.⁴

In the present case, no A1 certificate was issued by the Portuguese social security institutions, since the Court of First Instance, Namur, established that those certificates were forgeries.

However, the accused person submits that where there is evidence of fraud – a hypothesis that must include the case of forged A1 certificates which do not originate from the authority competent to issue them – the dialogue and conciliation procedure must nevertheless take place. He argues that it is an

³ Judgment of 6 February 2018, *Altun and Others* (C-359/16, EU:C:2018:63, paragraph 43).

⁴ Judgments of 26 January 2006, *Herbosch Kiere* (C-2/05, EU:C:2006:69, paragraph 21), and of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309, paragraph 38).

essential prerequisite for determining whether the conditions for the existence of a fraud are met.

In examining this ground of appeal, the Court of Appeal, Liège, notes at the outset that Regulation No 987/2009 codified the case-law of the Court of Justice, affirming the binding nature of the A1 certificate and the exclusive competence of the issuing institution to assess the validity of that certificate, and expressly reproducing the abovementioned procedure as a means of resolving disputes concerning both the accuracy of documents drawn up by the competent institution of a Member State and determining the legislation applicable to the worker concerned.⁵

However, such considerations must not result in individuals being able to rely on EU law for abusive or fraudulent ends.

Indeed, the principle of prohibition of fraud and abuse of rights is a general principle of EU law which individuals must comply with. Accordingly, the application of EU legislation cannot be extended to cover transactions carried out for the purpose of fraudulently or wrongfully obtaining advantages provided for by EU law.⁶

The Court of Appeal, Liège, observes that, especially in the context of suspicion of fraud, the implementation of the dialogue and conciliation procedure, prior to any final finding of fraud by the competent authorities of the host Member State, is of particular importance, since that procedure is such as to permit the competent institution of the issuing Member State and that of the host Member State to engage in dialogue and to cooperate closely in order to check and ingather, using the investigatory powers available to them under national law, all relevant matters of fact or law that may dispel or, on the contrary, confirm the accuracy of, the doubts expressed by the competent institution of the host Member State concerning the circumstances surrounding the issue of the A1 certificates which, in the present case, are considered to be forged.⁷

According to the case-law of the Court of Justice, that procedure constitutes an essential prerequisite for determining whether the conditions for the existence of a fraud are met and therefore, for taking all appropriate action as to the validity or otherwise of the A1 certificates at issue and as to which social security legislation is applicable to the workers concerned.⁸

⁵ Judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309, paragraph 59).

⁶ See judgments of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408, paragraph 38), and of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 27).

⁷ Judgment of 2 April 2020, *CRPNPAC and Vueling Airlines* (C-370/17 and C-37/18, EU:C:2020:260, paragraph 66).

⁸ Judgment of 2 April 2020, *CRPNPAC and Vueling Airlines* (C-370/17 and C-37/18, EU:C:2020:260, paragraph 71).

The Court of Justice appears to consider the dialogue and conciliation procedure to be an essential prerequisite, given the risk of undermining the principle that persons are to be subject to the legislation of a single Member State, the risk of double contributions, and the risk of jeopardising the dialogue and conciliation procedure which is based on sincere cooperation between the competent institutions of the Member States.

In the present case, although concrete evidence of fraud exists and was established and accepted by the Court of First Instance, Namur, it should also be noted that social security contributions were actually paid to the Portuguese social security authority without the Court of Appeal, Liège, being informed of the reasons for those payments, since both the prosecution and the civil party submit that the relevant companies were never active in Portugal.

Moreover, that fact is likely to have an impact on any confiscations ordered, where appropriate, by the Court of Appeal, Liège, if the charges before it were to be upheld.

In those circumstances, the Court of Appeal, Liège, considers it necessary to refer the questions set out in the operative part of this judgment to the Court of Justice of the European Union for a preliminary ruling.

ON THOSE GROUNDS,

[...]

The Court,

Before giving judgment on the substance of the case, rules that it is necessary to refer the following questions to the Court of Justice of the European Union for a preliminary ruling:

1. Is Regulation No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems to be interpreted as applying in a situation where it has been held, without the point being contested by the parties, that, first, the A1 certificates produced are forged according to the judicial authorities of the host State and, second, the investigations duly carried out by the judicial authorities of that host State appear to show that the certificates at issue were not issued by the competent authority of the issuing State, even though social security contributions have been paid to that authority?
2. If the answer to the previous question is in the affirmative, is the dialogue and conciliation procedure established by Article 76(6) of Regulation No 883/2004⁹ (which reproduces the procedure provided

⁹ [...]. [Footnote placed in parentheses in the main body of the question]

for in Article 84a(3) of Regulation No 1408/71) an essential prerequisite for determining whether the conditions for the existence of a fraud are met?

3. If the answers to the previous two questions are in the affirmative, in accordance with the principle of prohibition of fraud and abuse of rights, which is a general principle of EU law which individuals must comply with, may the authorities of the State in which the employees exercised their activity disregard the abovementioned A1 certificates, including in the absence of recourse to the dialogue and conciliation procedure in the event of suspicion of fraud, where the facts submitted for assessment by them support the conclusion that those certificates were produced as a result of conduct on the part of the employer which a judicial authority of the host State found to be fraudulent?

Reserves judgment as to the remainder and suspends the case *sine die*.

[...]

Delivered [...] on **25 May 2023** [...] [Signatures and standard wording]

WORKING DOCUMENT