

GMS Flash Alert

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European Union: European Court Rules on Dismissal of Certificates for Social Security

On 2 April 2020, the European Court of Justice ("ECJ" or "the Court") delivered a ruling in joint cases *C-370/17 and 37/18 Vueling* that a European Union (EU) member state can disregard certificates for social security coverage issued by another member state, if such certificates are obtained or relied on fraudulently.¹

However, the ECJ states that a member state that intends to dismiss the applicability of a certificate of coverage must immediately make concrete evidence of fraud available to the member state that issued the certificate. If the issuing member state does not review and cancel/withdraw a certificate where appropriate within "reasonable time" (more on this below), the member state can unilaterally dismiss the applicability of the issued certificates.

WHY THIS MATTERS

When applying for a determination of social security coverage, it is imperative that the factual circumstances meet the requirements under EU legislation. If an employer has obtained a certificate of coverage based on information that is incomplete or not factually accurate, serious consequences may ensue, that may affect the company's ability to assign an employee to a host country and employee's ability to claim benefits in the competent country.

Context

This ruling in *Vueling* is in line with previous rulings² by the ECJ on cases where a member state wants to dismiss the applicability of the certificates for social security issued by another member state (issuing member state). The Court

confirms that when the certificates are obtained or relied on fraudulently and the issuing member state has not reacted to the claims and evidence of fraud within reasonable time, a member state can dismiss the applicability of the certificates.

Court Cases in Detail

Vueling is an airline with its registered office in Spain and it is listed in the *register du commerce et des sociétés de Bobigny* in France in respect of the establishment of an air transport and self-handling business at Terminal I of the Paris-Charles de Gaulle Airport at Roissy. From 21 May 2007, Vueling began to operate regular flights between that airport and various cities in Spain.

First Case C-370/17 Vueling

In May 2008, the transport labour inspectorate in France issued a report stating that Vueling was engaged in “concealed employment” (more on that below) and the case was taken **to the French criminal court**.³

The statement regarding “concealed employment” concerned 50 cabin crew employees and 25 flight crew employees, all covered by Spanish social security, with certificates of coverage issued by Spain in accordance with the provision for temporarily posted employees. Only the ground employees were declared to be covered by French social security.

It was found that most of the employees carrying certificates for Spanish social security issued by the competent Spanish authority had little or no activity in Spain prior to their activity in France. This detail was important, because one of the conditions to apply the rules for posted employees is that prior to their posting the employees must have activity in the member state from which they are posted. In the case of the above-noted employees, this is why they are referred to as “concealed employees.”

Making matters worse, most of the employees in question had never resided in Spain, but were registered as residing at Vueling’s HQ address in Spain with respect to, amongst other things, their social security, employment contract and payroll. Here, the French criminal court claimed that false information about the employees’ residence was *a deliberate act on the part of Vueling to disregard the applicable rules*. Vueling was unable to provide a credible explanation to dispel the suspicion of fraud according to the Court.

In addition to the claims about the posted employees’ lack of previous activity in Spain, it was held that the Vueling branch in France and its operational base there constituted an independent entity and that there was no direct relationship or “organic link” between the posted employees and the Vueling entity in Spain. The condition for an “organic link” is also stipulated under the provision for posting of employees in the EU legislation for social security.

On 4 April 2012, French authorities brought the case to the attention of the Spanish institution that had issued the certificates and requested that they be cancelled. The certificates were cancelled, but upon Vueling’s appeal the competent higher administrative authority in Spain held that the certificates for social security coverage were to remain valid due to the length of time that had passed, making any correction with respect to social security contributions and benefits difficult.

Second Case C-37/18 Vueling

A co-pilot employed by Vueling in Spain in 2007 and posted to France was subject to Spanish legislation on social security. He resided in France and had a six-month contract which was extended for another six months. For the purposes of social security, payroll, and employment contracts, Vueling used its own address in Barcelona as the address of the co-pilot’s residence. Claiming that his contract was illegal under French law, the co-pilot resigned by letter of 30 May 2008; he then withdrew the resignation three days later, and on 9 June 2008, he took formal notice of the termination of his employment contract referring again to its illegality.

The reason for a request for a reclassification from “resignation” to a “notification of termination” is that a notification has the effects of a dismissal without real and substantial cause. This would make the co-pilot eligible for lump-sum compensation for concealed employment and damages as compensation for the loss suffered due to the failure to pay contributions to the French social security scheme, as he took the case **before the French civil court**.⁴

Questions to the ECJ

Below are questions that the ECJ considered:

1. Can certificates for social security coverage be disregarded by a country that has not issued the certificates, if such are obtained or relied on fraudulently?
2. Does the primacy of EU law preclude a national court or tribunal from taking action if the merits have already been litigated by a criminal court? This is an issue regarding the so-called *res judicata* principle that refers to a cause of action that may not be relitigated once it has been judged on the merits. In the first case, the French criminal court ruled on the issues around concealed employment for Vueling, which were the same conditions that were brought up in the second case before the civil court.

ECJ Ruling (Replies)

1. A member state can disregard certificates for social security coverage which were obtained or relied on fraudulently, by taking account of two conditions:
 - The information and evidence about the fraud is made available to the issuing member state without delay.
 - The issuing member state does not review or take action within reasonable time. In this case, over two years was deemed not reasonable time.
2. EU law does not require a national court to display the principle of the authority of *res judicata*.

KPMG NOTE

There is no uniform definition for fraud that is applied in all member states. This means that what one member state would consider to be legal or pragmatic could be deemed fraudulent by another member state.

It is therefore very important to disclose the facts when obtaining certificates of coverage, in order to help ensure their validity. One cannot rely on the validity of a certificate for social security issued according to EU legislation merely because a competent institution has issued the certificates. Certificates of coverage can be cancelled or dismissed in other member states if they – according to an assessment of the facts – are deemed to have been fraudulently obtained or relied on facts considered by that state as fraudulent.

FOOTNOTES:

1 ECJ ruling: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62017CJ0370&from=EN> . Also see: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=216089&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=13271571> .

2 See Case C-359/16 Altun and Others at: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=8AEBDA267F3224520DDBAF5C2662FD9B?text=&docid=200850&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3339260> .

3 *Cass. Crim. n°11-88420 du 11 mars 2014, Compagnie Easy Jet ; Cass. Crim. n°12-81461 du 11 mars 2014, Compagnie Vueling*. See *Cour de cassation-chambre criminelle, Audience publique du mardi 11 mars 2014, N° de pourvoi: 12-81461* at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000028728616> .

4 See the summary of the case (in French) *Arrêt n° 43 du 10 janvier 2018 (16-16.713)* before the *Cour de cassation - Chambre sociale* - *ECLI:FR:CCASS:2018:SO00043* and the referral to the ECJ at: https://www.courdecassation.fr/jurisprudence_2/arrets_publics_2986/chambre_sociale_3168/2018_8506/janvier_8507/43_10_38410.html .

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Contact us

For additional information or assistance, please contact your local GMS or People Services professional or the following professional with the KPMG International member firm in the Netherlands:



Daida Hadzic

Director

Tel. +31 6 532 54 599 (m)

Hadzic.daida@kpmg.com

The information contained in this newsletter was submitted by the KPMG International member firm in the Netherlands.

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