

GMS Flash Alert



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European Union - Changes Afoot on Substantial Activity of Temp Agencies?

On 10 December 2020, the Advocate General delivered his opinion on a pending case before the European Court of Justice (ECJ) in the case C-784/19 Team Power Europe.¹ The case deals with conditions for posting of workers employed with companies that hire out temporary staff. It is expected that the final ruling will be delivered within the next couple of months.

WHY THIS MATTERS

One of the conditions to maintain coverage under social security in the home country is that the employer performs a substantial part of its activities in that country.

The Advocate General has suggested to the ECJ that companies operating within placement and hiring out of workers do not need to place/hire out a substantial part of their workers to undertakings that hire in the home country in order to meet the “employer’s substantial activity condition.”

This opinion differs from the current general practice and understanding of how the employer’s substantial activity condition is interpreted and implemented today.

If the ECJ follows this opinion, it could lead to an unlevel playing field between companies that hire out temporary staff and companies in other industries. The companies that hire out temporary staff would meet the conditions for coverage under social security in the home country much more easily than other companies.

Case C-784/19 Team Power Europe

Brief Description

A company that hires out and places temporary workers is established in Bulgaria. Most workers are sent to undertakings that hire abroad.

The company applied for certificates of social security coverage in Bulgaria for workers sent to undertakings hiring in Germany. The applications were rejected because the authorities assessed that the company does not perform substantial activity in Bulgaria. This would then lead to the application of German social security, which is considerably more costly than Bulgarian social security.

The ECJ is therefore asked to determine if the Bulgarian company must place a substantial proportion of the workers with the undertakings in Bulgaria in order to meet the condition of substantial activity in Bulgaria that would allow continued application of Bulgarian social security for the workers who are placed with the undertakings in Germany.

The Advocate General argues, among other things, that the preparatory work in Bulgaria, such as selection and recruitment of temporary staff, should count as an activity in Bulgaria. He therefore continues to conclude that it is not necessary for such company to hire out a substantial part of workers in Bulgaria in order to meet the employer's substantial activity condition in Bulgaria.

KPMG NOTE

Several EU member states intervened in the hearing for this case arguing, among other things, that the core business of a company that provides temporary staff is a supply of workforce. Therefore, such a company should perform a substantial part of its core business in the country where it is established.

This means that the company would meet the employer's substantial activity condition during a posting if it hires out a substantial part of its workers/working hours in the country of establishment.

If the ECJ were to follow the opinion of the Advocate General, it would change the current implementation of the posting provision in the Regulation (EC) 883/2004.² Ultimately, it could lead to an internal market where the companies that work with a supply of workers have easier access to maintain coverage under social security in their home country than companies in other industries.

Also, in the event that the ECJ follows this opinion, companies in other industries that struggle to meet the condition for substantial activity would be advised to examine this case closely to see if any parts of such argument could be used in their own case.

Although the Advocate General claims that his assessment does not apply if fraud or abuse exists in a specific case, the practice shows that fraud and abuse are extremely difficult to prove. Additionally, each EU member state has its own way of investigating cases and has its own threshold for when something is fraud or abuse. Therefore, if this opinion becomes the final ruling, it is possible that it could ignite an appetite for some companies to rely more on temporarily-hired workers rather than their own workers and ultimately it could give a competitive advantage to companies that temporarily hire out workers over companies in other industries.

FOOTNOTES:

- 1 See: [Advocate General opinion in case C-784/19 Team Power Europe](#).
- 2 For the full text, see: [Regulation \(EC\) for coordination of social security in the EU, no 883/2004](#).

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