

GMS Flash Alert



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European Union – Validity of A1 Certificates for Social Security

On 2 March 2023, the Court of Justice for European Union (CJEU) ruled in two joint cases¹ that an assessment of an employer’s establishment/place of business for social security purposes must be assessed according to the rules under the European regulation for social security.² A license to operate in road transport issued by an EU member state does not constitute documentation that a company has a place of establishment in the EU member state that issued this license when one needs to determine which country’s social security applies.

Furthermore, the CJEU clarifies to social security administrations in the EU that provisional withdrawal of A1 certificates does not suspend the binding effect of these certificates. In a case of fraud, the issuing member state must decide whether to withdraw its certificates for social security within reasonable time. In this specific case, the CJEU found that the administration in Slovakia took an unreasonably long time to consider whether to withdraw its certificates definitively.

WHY THIS MATTERS

Employers should not assume that when they meet requirements for the company’s establishment in an EU member state for one purpose – in this instance a license to operate in road transport – that this becomes an automatic approval of the same condition for other purposes, such as social security. Although the legal terminology in mobility of employees can overlap, the substance of this terminology is defined in each legal area independently and the same facts can lead to entirely different conclusions in different legal areas.

Employers should be aware that there is no uniform definition of fraud across the EU. A threshold for fraud can vary significantly from country to country. When an administration in an EU member state proves according to its own rules that A1 certificates are obtained fraudulently, the administration can disregard these certificates retroactively after allowing the issuing member state reasonable time to withdraw the said issued certificates. It can be assumed that “reasonable time” in case of fraud is relatively short.

Cases

Case C-410/21: The managing director of a road transport company in Belgium set up a company in Slovakia and holds a Community license to operate in road transport³ that was issued in Slovakia. The competent Slovak institution issued A1 certificates for Slovak social security coverage to a number of employees employed by the entity in Slovakia.

The Belgian social security inspectorate investigated both companies and concluded that the Slovak entity had no economic activity and was managed from Belgium. The Belgian inspectorate concluded that the set-up in Slovakia was made to access the cheap labour force, and it brought criminal proceedings against that managing director.

While the criminal proceedings in Belgium were underway, the Belgian social security authority requested of the Slovak competent institution that it withdraw its A1 certificates for Slovak social security retroactively. The Slovak institution decided to withdraw the issued A1 certificates provisionally. This meant that the employees in question would remain covered by Slovak social security until the Slovak institution was ready to make the final call on whether to withdraw the certificates definitively.

CJEU established that the Slovak institution was not applying the set conciliation procedure for social security administrations correctly by taking an unreasonably long time to consider whether to withdraw the A1 certificates. Furthermore, CJEU clarified that provisional withdrawal of A1 certificates does not suspend the binding effects of the certificates and it cannot validate the unreasonably long time taken by the Slovak institution in this instance to decide whether to withdraw the certificates.

Case C-661/21: In this second case, the managing director of a road transport company in Belgium is also the owner of a company specialising in transport and logistics services established in Lithuania. The Lithuanian company holds a Community license for road transport issued by the Lithuanian authorities.

The Belgian social security inspectorate investigated both companies and concluded that drivers were recruited in Lithuania only to be sent to Belgium to sign an employment contract with the Belgian company and drive in Belgium and its neighbouring countries. The Belgian authorities brought the managing director and its Belgian road transport company before the criminal court claiming fraud as they had avoided to pay social security contributions in Belgium.

The drivers were covered by social security in Lithuania under a claim that both their residence and the employer's establishment were in Lithuania and therefore Lithuanian social security should apply. The managing director in Belgium claimed that the employer was established in Lithuania and supported this claim with the fact that the Lithuanian authority had issued a Community license to the Lithuanian company to operate in road transport.

CJEU concluded that a Community license for road transport cannot be used to substantiate an assessment of the employer's establishment for the purposes of social security. This means that when an employee is working in several EU member states, the employer's place of establishment must be assessed according to the EU rules for social security.

KPMG INSIGHTS

Although the outcome in these cases is not unexpected, it is a timely reminder to employers that even if the same terminology runs through and is addressed by several legal areas, the substance of this terminology can be significantly different from one legal area to another.

For example, the employer's country of establishment can appear as a condition in multiple statutory texts, but when one determines applicable legislation for social security one must refer to the statutory text in the EU regulation for social security. Should one use the understanding of the employer's country of establishment in one legal area (e.g., the EU licenses to operate in road transport) to determine applicable law for social security? As these cases show, if that happens, one will likely not reach the correct result/outcome.

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KPMG INSIGHTS continued:

Another timely reminder to employers that can be drawn from these cases concerns the understanding of fraud. There is no uniform definition of fraud across the EU. This means that there is no common threshold between “ordinary” failure to comply with the rules (correctly) and fraud, which refers to an intent of a party to avoid or abuse certain rules to their own (unfair) advantage.

Whenever employers alter their organisation or establish or acquire new companies, they should assess the applicable law for social security for cross-border workers affected by those changes. Even if one receives approved A1 certificates for social security coverage, these certificates can be void if they are obtained without disclosing all relevant information – and not disclosing all relevant information in some EU member states can qualify as an intent to avoid/abuse the rules and, as a result, subject one to criminal prosecution.

FOOTNOTES:

- 1 CJEU, FU, [DRV Intertrans BV \(C-410/21\), Verbraecken J. en Zonen BV, PN \(C-661/21\)](#), 2 March 2023.
- 2 Regulation (EC) on coordination of social security systems no. [883/2004](#), 29 April 2004.
- 3 [European Regulation 1071/2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport](#), 21 October 2009.

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KPMG Global Mobility Services webcast Future focus: The employee experience of tomorrow

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Future focus: The employee experience of tomorrow

28 March 2023 | 02:00 pm EDT (UTC -5)

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